

No. 90-634

Supreme Court, U.S.
FILED
NOV 2 1990
JOSEPH F. SPANOL, JR.
CLERK

IN THE
Supreme Court of the United States

October Term, 1990

DAN COHEN,

Petitioner.

vs.

**COWLES MEDIA COMPANY, d/b/a Minneapolis Star
and Tribune Company, and NORTHWEST PUBLICA-
TIONS, INC.,**

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF MINNESOTA

PETITIONER'S REPLY MEMORANDUM

Elliot C. Rothenberg
3901 West 25th Street
Minneapolis, MN 55416
(612) 926-8185
Counsel for Petitioner

IN THE
Supreme Court of the United States

October Term, 1990

No. 90-634

DAN COHEN,

Petitioner.

vs.

**COWLES MEDIA COMPANY, d/b/a Minneapolis Star
and Tribune Company, and NORTHWEST PUBLICA-
TIONS, INC.,**

Respondents.

**ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF MINNESOTA**

PETITIONER'S REPLY MEMORANDUM

In this case, a Minnesota jury awarded petitioner Dan Cohen \$200,000 in compensatory damages and \$500,000 in punitive damages after finding respondents liable for breach of contract and misrepresentation for violating promises of confidentiality given in exchange for desired information. The trial court denied motions for summary judgment and judgment notwithstanding the verdict. The Minnesota Court of Appeals affirmed the verdict for compensatory damages and the finding of breach of contract over respondents' First Amendment claims. The Minnesota Supreme Court, however, by a vote of four to two, held that a contract

cause of action was inappropriate and also held that Mr. Cohen could not recover under a contract implied through promissory estoppel on the grounds that it would violate the First Amendment rights of respondents.

Most of the issues raised by respondents already have been addressed in the petition. This brief will be confined to two matters.

Respondents claim that the opinion below was "meant to be narrow" and charge that the petition "mischaracterizes" a "carefully limited decision as 'empower[ing] newspapers to inflict injuries with impunity by deliberately breaking promises of confidentiality given for the purpose of obtaining desired information.'" Northwest Publications brief at 7, Cowles Media brief at 2-3, 5. The opinion said only that, "there may be instances where a confidential source would be entitled to a remedy such as promissory estoppel." A-14.

Moreover, respondents' claims are contradicted by previous statements by the Cowles Media counsel that the opinion below is more comprehensive. *Media Law Reporter News Notes*, Vol. 17, No. 34, July 31, 1990, at 3, attributed the following comments to Mr. Borger:

He said that while he has concerns that the court did not firmly shut the door on promissory estoppel claims in regard to promises between reporters and their sources, it appears the number of claims where promissory estoppel would be recognized would be extremely limited.

"The circumstances of this case, as Cohen would probably argue, presented some strong arguments on the plaintiff's side. If the court doesn't recognize (promissory estoppel) in this situation, I don't think

they'll recognize promissory estoppel in many others," Borger said. "I think it's safe to say it'll be a very rare occurrence when a promissory estoppel claim gets very far."

While acknowledging that it has presented First Amendment arguments "from the inception of this case," respondent Northwest Publications claims that the treatment below of First Amendment issues was dicta apparently because the promissory estoppel doctrine was not previously raised in this case. Northwest Publications brief at 10, 12, 15. Nevertheless, the conclusion below (A-13-14), that enforcement of the promises to Mr. Cohen under a promissory estoppel theory would violate respondents' First Amendment rights, is a holding rather than dicta under any reasonable reading. It is irrelevant under what circumstances an issue was raised in the highest state court when the question was actually considered and decided. *Orr v. Orr*, 440 U.S. 268, 274-5 (1979).¹

For the reasons stated above and in his petition, petitioner Dan Cohen respectfully requests that this Court grant a writ of certiorari in this case.

Respectfully submitted,

ELLIOT C. ROTHENBERG
Counsel for Petitioner
 3901 West 25th Street
 Minneapolis, MN 55416
 (612) 926-8185

Dated: November 19, 1990

¹The Northwest Publications brief also erroneously claims (at 4) that "the Whitney campaign acknowledged that Cohen was the source of the documents." The actual testimony was that a campaign official "insisted Whitney knew nothing of Cohen's plans to release the court records." Tr. at 1437, lines 16-18.